No. 20183

In the

United States Court of Appeals

for the Ninth Circuit

THE TRAVELERS INSURANCE COMPANY
and
THE TRAVELERS INDEMNITY COMPANY,
Appellant,

vs.

REAN WILLIAM MCELROY, JR.,
Appellee.

Brief for the Travelers Insurance Company and The Travelers Indemnity Company

---

KRAMER, ROCHE, BURCH & STREICH
567 First National Bank Bldg.
Phoenix, Arizona
Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

No. 20183

In the

United States Court of Appeals

for the Ninth Circuit

THE TRAVELERS INSURANCE COMPANY
and
THE TRAVELERS INDEMNITY COMPANY,
Appellant,

vs.

REAN WILLIAM MCELROY, JR.,
Appellee.

Brief for the Travelers Insurance Company and The Travelers Indemnity Company

---

OPINION BELOW

There is no opinion reported below.

BASIS FOR JURISDICTION

Jurisdiction of the District Court was based upon Section 1332 of Title 28, U.S.C. (78 Stat. 445). Appellant (defendant below) is a corporate citizen of the State of Connecticut. Appellee is a citizen of the State of Arizona. The amount in controversy is One Hundred and Five Thousand Dollars ($105,000.00), exclusive of interest and costs (T.R. p. 2).

The Court of Appeals has jurisdiction to review the judgment of the District Court under Section 1291 of Title 28, U.S.C. (72 Stat. 348).

STATEMENT OF THE CASE

On September 10, 1962, Colonial and Pacific Frigidways, Inc., (hereinafter referred to as C & P) as seller, and Donald L. Jacobs, (hereinafter referred to as Jacobs) as buyer, executed in the State of Iowa a conditional sales contract for the sale of a White Freightline Tractor (p. 5—Jacobs' deposition; p. 7 Jacobs' deposition—marked as Exhibit No. 1 for identification).

On the same date Jacobs and C & P entered into a lease agreement whereby Jacobs leased his newly acquired tractor to C & P (p. 8 Jacobs' deposition—marked as Exhibit No. 2 for identification). The relationship was then as follows: Jacobs was lessor and C & P was lessee. C & P, as lessee of the tractor, agreed to pay Jacobs, the lessor, for the C & P business use of his tractor 72% of the gross receipts on westbound loads and 85% of the gross receipts on eastbound produce loads (Paragraph 4 of Lease Agreement). It should be pointed out at this juncture that C & P is a transportation company handling frozen and refrigerated products. Meat products were picked up in the midwest and transported to the west coast. On return trips produce was hauled to the midwest (ps. 11-12 Jacobs' deposition). All expenses incidental to the operation of said motor vehicle, including the purchase of collision insurance, was a cost to be borne by the lessor Jacobs (Paragraph 6 of Lease Agreement). In addition, the lessor agreed to hire certain personnel, subject to C & P's approval, to assist the lessor in driving said motor vehicle.

Simultaneously with the execution of said Lease Agreement, defendant Travelers Insurance Company (hereinafter referred to as Travelers) issued its comprehensive automobile liability policy No. RSLA 4325488 to C & P, the lessee, for a policy period commencing on September 10, 1962, and terminating on September 10, 1963 (T.R. 46-63).

The policy was written on defendant's Form C-9444 Ed. April, 1955, and Form 4050-A entitled Receipts Basis—Truckmen (Form A) (T.R. 58-59). The pertinent provisions of the Receipts Basis—Truckmen policy provided, among other things, as follows:

> "It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability, for Automobile Medical Payments and for Property Damage Liability applies with respect to all owned automobiles and hired automobiles, and the use, in the business of the named insured, of non-owned automobiles, subject to the following provisions:
>
> 1. Definition of Insured. As respects such insurance, Insuring Agreement III, Definition of Insured, is replaced by the following:
>
> With respect to the insurance for Bodily Injury Liability and for Property Damage Liability the unqualified word 'insured' includes the named insured and also includes any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, and any executive officer of the named insured with respect to the use of a non-owned automobile. The insurance with respect to any person or organization other than the named insured does not apply: . . .
>
> "(d) with respect to any hired automobile, to the owner or any lessee of such automobile, or to any agent or employee of such owner or lessee, if the accident occurs (1) while such automobile is not being used exclusively in the business of the named insured and over a route the named insured is authorized to serve by federal or public authority, or (2) after arrival of the automobile at its destination under a single-trip contract which does not provide in writing for the return trip of the automobile;

> (e) with respect to any non-owned automobile, to any executive officer if such automobile is owned by him or a member of his household; . . ."

Thereafter Jacobs, the lessor, employed Donald Trujeque as his employee to assist him in driving the tractor and paid him a sum certain per trip plus expenses while in route (P. 9 Jacobs' deposition; p. 26 Trujeque's deposition).

On December 22, 1962, Jacobs, the lessor, and Trujeque, his employee, had come to Phoenix, Arizona, in order to spend the Christmas holidays with their respective families. The tractor and trailer were empty of merchandise during this period. Jacobs had previously delivered a load of merchandise to the west coast and was between trips (P. 23 Jacobs' deposition).

On December 22, 1962, Trujeque was permitted by Jacobs to take the tractor, without the trailer attached thereto, to his house to clean it up (P. 20 Jacobs' deposition). Trujeque took the tractor to his home and washed it the following morning which was December 23, 1962, and in addition to washing it had it serviced (P. 13 Trujeque's deposition). On the night of December 23, 1962 Trujeque and the plaintiff McElroy, an acquaintance of Trujeque, went in the tractor to pick up Trujeque's brother (P. 15 Trujeque's deposition). As they were returning to Trujeque's house, an accident occurred in which the plaintiff was injured. The plaintiff, McElroy, was not known by Jacobs nor was he employed by Jacobs in any capacity (P. 16 Trujeque's deposition; P. 20 Jacobs' deposition). Thereafter, plaintiff filed an action (Cause No. 147641) in the Superior Court of Maricopa County, Arizona, naming as defendants Trujeque and Jacobs (T.R. 34-36). Travelers insured C & P was not a party to that lawsuit (T.R. 34-36). The Complaint alleged, among other things, as follows:

"That on or about the 23rd day of December, 1962, at approximately 8:40 P.M., defendant, MIKE E. TRUJEQUE, was driving a 1957 Freight-Way truck-tractor in a northerly direction on North 51st Avenue in the vicinity of the 3600 block in the City of Phoenix, Arizona; that said truck-tractor was, at said time, *owned by Defendant, DON JACOBS*, and that defendant, MIKE E. TRUJEQUE, was then and there operating said truck-tractor as the agent on behalf and with the consent, permission and authority *of the owner, defendant DON JACOBS*." (Emphasis ours.)

Plaintiff's theory in Cause No. 147641 as against Jacobs was pursuant to the doctrine of respondeat superior in that Trujeque was the agent of the owner Jacobs at the time of the accident in question. Trujeque failed to file an appearance in plaintiff's action, and a default judgment in the sum of $105,000.00 was entered on May 20, 1963, against Trujeque (T.R. p. 33). That action is still pending against Jacobs, and no judgment has ever been taken as against Jacobs as of the date of this brief.

On December 5, 1963, Cause No. 4961 was filed by plaintiff against Travelers Insurance Company in the District Court of the United States in and for the District of Arizona. That Complaint (T.R. 1 and 2), *inter alia*, alleged as follows:

"That prior to the 23rd day of December, 1962, the defendants had issued to Colonial & Pacific Frigidways, Inc., a policy of insurance in which the defendants agreed to insure the said Mike E. Trujeque against any liability for bodily injuries which should arise out of the ownership, maintenance or use of the aforementioned 1957 Freight-way truck; said policy was in full force and effect and covered the use of said vehicle by Mike E. Trujeque on the 23rd day of December, 1962."

Travelers answered said Complaint on January 28, 1964 (T.R. 5) denying all material allegations thereto. Thereafter depositions were taken; and on December 16, 1964, Travelers filed a Motion for Summary Judgment (T.R. 15-16). Plaintiff McElroy replied to defendants' Motion for Summary Judgment and filed a cross-motion for summary judgment on January 7, 1965. Oral argument was had thereon; and the lower court issued an order on March 2, 1965, granting plaintiff's cross-motion for summary judgment (T.R. 38). Thereafter and on March 5, 1965 defendants filed a Motion for Reconsideration (T.R. 39). The court denied the Motion for Reconsideration and entered formal judgment against Travelers on March 29, 1965 in the amount of $10,000.00 plus interest (T.R. 40). This appeal followed.

QUESTION PRESENTED

Whether the Traveler's policy issued to the insured provides coverage, either by the policy provisions therein or by operation of law, when the vehicle leased to the insured is not being used by the insured or in the business of the insured?

SUMMARY OF THE ARGUMENT

Traveler's insurance policy issued to Colonial & Pacific by its very terms did not afford coverage to Trujeque at the time of the accident in question. The Arizona Financial Responsibility Act does not nor was it intended to apply to a policy of insurance issued to a non-owner.

ARGUMENT

1. The policy of insurance issued to C & P by its very terms is not applicable to Trujeque and did not afford him coverage at the time of the accident in question.

THE VEHICLE WAS NOT OWNED BY C & P AT THE TIME OF THE ACCIDENT.

It is undisputed that this motor vehicle was not owned by C & P at the time of the accident. When plaintiff obtained his default judgment against Trujeque in Cause No. 147641 he alleged (T.R. 34) as follows:

> "That on or about the 23rd day of December, 1962, at approximately 8:40 P.M., defendant MIKE E. TRUJEQUE, was driving a 1957 Freight-Way truck-tractor in a northerly direction on North 51st Avenue in the City of Phoenix, Arizona; that said truck-tractor was, at said time, *owned by Defendant, DON JACOBS*, and that defendant, MIKE E. TRUJEQUE, was then and there operating said truck-tractor as the agent on behalf and with the consent, permission and authority of the *owner, defendant DON JACOBS*." (Emphasis ours.)

The above allegation by plaintiff in his Complaint filed in the Superior Court of the State of Arizona was the theory under which a judgment in the amount of $105,000.00 was rendered. The fact of ownership became merged in the judgment rendered against Trujeque.

On September 10, 1962 Jacobs purchased from C & P a tractor truck[1] for a total price of $14,309.17. He paid $3,500.00 to C & P as down payment and obligated himself by contract to pay the balance in certain monthly installments until the full purchase price was paid.

---

1. C & P, as seller and Jacobs, as buyer executed in Iowa a conditional sale contract wherein Jacobs was purchaser and C & P was seller. See Jacobs' deposition, page 7 and Exhibit No. 1 marked for identification.

As to the date of purchase Jacobs testified as follows: (P. 5 Jacobs' deposition)

> "When did you buy this truck from Colonial & Pacific Frigidways?
>
> A. Do you want the exact date on this?
>
> Q. As near as you can recall, yes.
>
> A. The 10th day of September, 1962."

In obtaining the default judgment against Trujeque, plaintiff at all times asserted ownership of the truck in Jacobs. In their argument to the court on their cross-motion for summary judgment they contended that C & P was the owner of the truck in question.

The parties having executed a contract in the State of Iowa for the purchase and sale of said truck are thereby bound by Iowa law. *Ruby v. United Sugar Co. S.A.,* 56 Ariz. 535, 109 P.2d 845 (1941).

Applying the Arizona rule regarding conflict of laws, the question of ownership must be resolved by the rule of *lex loci contractus* which is the State of Iowa in the instant case. *Ruby v. United Sugar Co. S.A., supra.* Since October 1, 1953, Iowa has had in effect a Certificate of Title Law. Material hereto, subsection 2 of section 321.45, Code of Iowa, 1962 provides:

> "Except as provided in section 321.50 and except for the purpose of section 321.493 no person shall acquire any right, title, claim or interest in or to any vehicle subject to registration under this chapter from the owner thereof except by virtue of a certificate of title issued or assigned to him for such vehicle or by virtue of a manufacturer's or importer's certificate delivered to him for such vehicle; nor shall any waiver or estoppel operate in favor of any person claiming title to or interest in any vehicle against a person having possession of the certificate of title or manufacturer's or importer's certificate for such vehicle for a valuable

consideration. Except as provided in section 321.50 and except for the purpose of section 321.493 no court in any case at law or equity shall recognize the right, title, claim or interest of any person in or to any vehicle subject to registration sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued or assigned in accordance with the provisions of this chapter."

Section 321.493 Code of Iowa, 1962, commonly called the consent statute, or the Owner's Responsibility Law, provides:

"In all cases where damage is done by any motor vehicle by reason of negligence of the driver, and driven with the consent of the *owner, the owner* of the motor vehicle shall be liable for such damage.

"*A person who has made a bona fide sale or transfer of his right, title, or interest in or to a motor vehicle and who has delivered possession of such motor vehicle to the purchaser or transferee shall not be liable for any damage thereafter resulting from negligent operation of such motor vehicle by another, but the purchaser or transferee to whom possession was delivered shall be deemed the owner.* The provisions of subsection 2 of section 321.45 shall not apply in determining, for the purpose of fixing liability hereunder, whether such sale or transfer was made." (Emphasis ours.)

The first paragraph of the consent statute has been a part of the Iowa statutory law in substantially its present form since 1919. The second paragraph in its present form was added to this statute in 1955 by section 8, Chapter 157, Acts of the Fifty-sixth General Assembly.

Cases decided before the second paragraph in section 321.493 was enacted held that proof of vehicle registration

made a prima facie case of ownership in the registrant. The registration created an inference of ownership. Nevertheless, the same cases declared the inference could be rebutted by evidence. Accordingly, registration did not conclusively establish ownership. *Sexton v. Lauman,* 244 Iowa 570, 57 N.W.2d 200 (1953); *Bash v. Hade,* 245 Iowa 322, 62 N.W.2d 180; *Craddock v. Bickelhaupt,* 227 Iowa 202, 288 N.W. 109 (1939).

Hartman v. Norman, 253 Iowa 694, 112 N.W. 2d 374 (1962) which was decided since the amendment to section 321.493 construes the amendment so as to leave no doubt that it was designed to relieve a bona fide seller from liability from the negligence of his transferee occurring subsequent to the transfer. In *Hartman* an automobile driven by one defendant was at the time of the accident of record in the name of the other defendant. The plaintiff sued the owner of record as well as the driver. The owner of record urged as a defense that prior to the collision it had made a bona fide sale and delivery of possession of the vehicle to the driver. The owner of record was a licensed motor vehicle dealer. The accident occurred seven days after the purported sale and delivery. The court stated:

> "We can think of no purpose in the enactment of what is now the second paragraph of section 321.493 other than to cover situations such as we have in the case before us. The statute is definite and specific. It provides that a person who has made a bona fide sale and who has delivered possession to the purchaser shall not be liable for any damage thereafter resulting from negligent operation by another. It also provides that subsection 2 of section 321.45 (the provision for proof of ownership by certificate of title) shall not apply in determining, for the purpose of fixing liability, whether such sale was made. The question under this statute is not who may own the vehicle or have a lien according

to the county records. It is not who may owe for the purchase price or how the indebtedness is evidenced. If there was a bona fide sale and delivery of possession, the statute relieves the seller from liability for subsequent negligence of the operator . . . *In the case before us the uncontradicted evidence shows that defendant Coy by written instrument agreed to purchase the car in question. There was a bona fide sale. The down payment was made. Possession was delivered. Coy took and retained possession. Under the statute he was the owner for the purpose of determining liability. Under the statute defendants were not liable.*" (Emphasis ours.)

Likewise, in the instant case Jacobs agreed to purchase the tractor by executing a written contract. He paid $3,500.00 down and took and retained possession of the tractor.

Judge Graven of the United States District Court for the Northern District of Iowa in *Federated Mutual Implement & Hardware Insurance Co. v. Rouse*, 133 F. Supp. 226 (1955) held that an automobile dealer who had purchased a used car and resold it under a conditional sales contract was not an owner within Iowa's Owners' Responsibility Law, even though he had failed to comply with Iowa Motor Vehicle Certificates of Title Act and had failed to provide for a new certificate.

It is respectfully asserted that the facts, the law and the documentary evidence in the record establish beyond any doubt that C & P was not the owner of the tractor at the time of the accident.

TRAVELER'S POLICY ISSUED TO C & P BY ITS VERY TERMS EXCLUDES COVERAGE TO TRUJEQUE IN THIS CASE.

Travelers' liability policy issued to C & P (T.R. 58-59) provides, *inter alia*, as follows:

> "It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability, for Automobile Medical Payments and for Property Damage Liability applies with respect to all owned automobiles *and hired automobiles, and the use, in the business of the named insured, of non-owned automobiles,* subject to the following provisions:
>
> ". . . The insurance with respect to any person or organization other than the named insured does not apply: . . .
>
> "(d) with respect to any hired automobile, to the owner or any lessee of such automobile, or to any agent or employee of such owner or lessee, *if the accident occurs (1) while such automobile is not being used exclusively in the business of the named insured* . . .
>
> "(e) with respect to any non-owned automobile, to any executive officer if such automobile is owned by him or a member of his household; . . ." (Emphasis ours.)

A court cannot and should not do violence to the plain terms of a contract. However, the lower court by granting plaintiff's cross-motion for summary judgment in effect either disregarded entirely the provisions of the policy or rewrote the contract for the parties. This it cannot do. In situations in which reasonable interpretation favors the insurer and any other would be strained and tenuous, no compulsion exists to torture or twist the language of the contract. As stated by the California Supreme Court in *Continental Casualty Co. v. Phoenix Construction Co.,* 296 P.2d 801, 806, 46 Cal. 2d 423 (1956):

> "An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected."

The Arizona Supreme Court has decided that an unambiguous contract *must* be interpreted according to the terms set forth therein. *City of Phoenix v. Tanner*, 161 P.2d 923, 63 Ariz. 278 (1945); *Galbraith v. Johnston*, 373 P.2d 587, 92 Ariz. 77 (1962).

It is well established in Arizona that an employee who has abandoned his employment and is engaged in personal and private affairs at the time of the accident is not acting within the scope of his employment. *Peters v. Pima Mercantile Co., Inc.*, 42 Ariz. 454, 27 P.2d 143 (1933); *Otero v. Soto*, 34 Ariz. 87, 267 P. 947 (1928); *Johnston v. Hare*, 30 Ariz. 253, 241 P. 546 (1926). Trujeque was not acting within the scope of his employment by Jacobs at the time of this accident so as to bring him within the plain terms of the policy. The undisputed facts show that Trujeque was using the tractor-truck solely for his own personal use at the time of the accident in that he had picked up his brother [who was not employed by Jacobs or C & P] and was taking him to his home. (P. 15 Trujeque's deposition). In no wise could this be construed to be operation of the truck-tractor "in the business of the named insured" C & P which contractually dictates coverage under the policy.

As evidenced by the above insurance policy, C & P *fully* insured its interest in the vehicle when it was operating for and in the business of C & P. As is obvious, C & P's insurance coverage was entirely and completely commensurate with its obligation to compensate the owner for the business use thereof by C & P. In other words, C & P fully insured the tractor-truck when it was being used in the business of C & P. A policy provision requiring that a vehicle be used "in the business of the named insured", is not a restriction because it offers full coverage to all persons driving said vehicle while said vehicle is being used for the benefit of the named insured. If the vehicle is being

used for any other purpose then coverage is not afforded to the driver under this type of policy whether that driver be Jacobs, Trujeque or any other person.

2. A non-owner lessee does not come within the purview of the Arizona Financial Responsibility Act when the leased vehicle is not being used in the business of the insured lessee.

The Financial Responsibility Law of Arizona provides, *inter alia*, as follows: (A.R.S. § 28-1170)

> "B. The *OWNER'S POLICY* of liability insurance must comply with the following requirements:
>
> "1. *IT* shall designate . . .
>
> "2. *IT* shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured, against loss . . ." (Emphasis ours.)

Since the intention of the legislature embodied in a statute is the law, the fundamental rule of construction to which all other canons of construction are subordinate, is that the court shall, by all aids available ascertain and give effect to that legislative intent. *Valley National Bank of Phoenix v. Apache County,* 57 Ariz. 459, 114 P.2d 883 (1941); *Keller v. State,* 46 Ariz. 106, 47 P.2d 442 (1935); *State v. McEuen,* 42 Ariz. 385, 26 P.2d 1005 (1933); *Payne v. Knox,* 94 Ariz. 380, 385 P.2d 514 (1963).

When the language of a statute is plain and unambiguous, there is no occasion for construction. *Adams v. Bolin,* 74 Ariz. 269, 247 P.2d 617 (1952); *Church v. Collier,* 71 Ariz. 353, 227 P.2d 385 (1951); *State v. Airesearch Mfg. Co.,* 68 Ariz. 342, 206 P.2d 562 (1949). And effect must be given to its obvious meaning. *Parraek v. Ford,* 68 Ariz. 205, 203 P.2d 872 (1949); *Millett v. Frohmiller,* 66 Ariz. 339, 188 P.2d 457 (1948).

It is well established that in the judicial construction of legislation, words used will be given their usual, natural, plain, ordinary, and commonly understood meaning. *Kuts-Cheraux v. Wilson*, 71 Ariz. 461, 229 P.2d 713 (1951), reheard 72 Ariz. 37, 230 P.2d 512 (1951).

It can hardly be asserted that the above statute is ambiguous or that it by some form of osmosis incorporates therein the tractor truck at the time of this accident.

The Arizona Legislature in enacting this law manifested its intention that it apply *ONLY* to an *owner's policy* in the clearest of language. The *IT* in paragraphs 1 and 2 refers plainly to "*THE OWNER'S POLICY*" and any other construction would be antithetical to the plain and unambiguous language used therein.

A.R.S. § 28-1170 was amended by the Arizona Legislature in 1961 (Ch. 94, § 4). However, subparagraph B including 1 and 2 thereunder were not changed either in substance or in form. In fact, the only changes brought about by the amendments were in (a), (b) and (c) under paragraph 2 which raised the limits of coverage required. It is evident that had the legislature desired to extend this statute to include hired or non-owned motor vehicles it could readily have done so by including the non-owner policy with the existing "owner policy". This it did not do and therefore it is basic and fundamental that the Courts will not usurp this prerogative of the legislature.

The identical issue involved in this appeal was considered by the Circuit Court of Appeals in *Clarke v. Harleysville Mut. Casualty Co.*, 123 F.2d 499 (4th Cir., 1941) to which the Appellant respectfully directs this Court's attention. The Court stated as follows: (at page 500)

> "The only question with which we need concern ourselves then is: Does a non-ownership policy come

> within the purview of this Statute so as to compel the inclusion of the Omnibus Coverage Clause as a part of the policy?"

In its decision the Court decided the above defined issue in the negative and went on to say at page 502:

> "We have probed the language of the statute in question carefully, taking into account all the imponderable connotations which cluster around the words used and are suggestive of the legislative intent. *Having done so, we are unable to find any indication that the Legislature intended to make paragraph two of the statute embrace non-ownership policies. On the contrary, the plain and unambiguous language of the statute rebuts any such inference.* It is the duty of the court to construe the statute as written and not indulge in interesting speculations as to what the statute might have been but was not. . . . we cannot ignore what appears to have been a crisp legislative distinction expressed in terms that are anything but uncertain. We sit, after all, as an appellate court, not as an ancient oriental cadi, dispensing a rough and ready equity according to the dictates of his unfettered discretion." (Emphasis ours.)

As pertains to the Arizona statute not only did the Arizona legislature decline to amend to include a non-owner policy but in addition thereto it did not amend or delete A.R.S. § 28-1172 which specifically EXCLUDES a non-owner from this chapter dealing with the Uniform Motor Vehicle Safety Responsibility Act. Section 28-1172 states as follows:

> §§ 28-1172. Chapter not to affect other policies. A. This chapter shall not be held to apply to or affect policies of automobile insurance against liability which are required by any other law of this state, and such policies, if they contain an agreement or are endorsed

to conform with the requirements of this chapter, may be certified as proof of financial responsibility under this chapter.

"B. This chapter shall not be held to apply to or affect policies insuring solely the insured named in the policy against liability resulting from the maintenance or use by persons in the insured's employ *OR ON HIS BEHALF OF MOTOR VEHICLES NOT OWNED BY THE INSURED.*" (Emphasis ours.)

Section 28-1172, *supra*, makes it abundantly and categorically clear that no coverage was extended under the facts of this case to Trujeque who was not at the time operating the leased vehicle in the business of the insured C & P.

The record is gorged with the fallacious argument that Trujeque did or did not have the express or implied permission of Jacobs and/or C & P to operate the tractor truck at the time of the accident.

This argument is based upon paragraph 2 of the Financial Responsibility Law of Arizona, *supra*. To juxtapose this permission argument with the above statute is to expose its spuriousness. The permission, express or implied, is of no moment in the instant case because the statute applies *ONLY* to an *Owner's Policy*.

THE ARIZONA SUPREME COURT IN JENKINS v. MAYFLOWER INSURANCE EXCHANGE, 93 ARIZ. 287, 380 P.2d 145 (1963) DOES NOT EXTEND THE ARIZONA FINANCIAL RESPONSIBILITY ACT TO INCLUDE A NON-OWNER INSURED.

The lower court rendered no written opinion in this case. No reason was advanced by the court as to why the judgment was limited to $10,000.00. Plaintiffs in their argument and briefs relied heavily on *Jenkins v. Mayflower, supra*. They evidently convinced the lower court that *Jenkins* was applicable and controlling as to a non-owner type

policy. The judgment, therefore, of necessity must have been rendered by applying the rule enunciated in *Jenkins* to a non-owner type policy. The lower court must have been persuaded in reading *Jenkins* that the "omnibus clause" of an "owner's policy" must be incorporated as a matter of law in a non-owner type policy of insurance. The amount of the judgment was limited to $10,000.00 evidently because the court felt that Trujeque was an additional insured under C & P's non-owner type policy and, therefore, Trujeque was entitled to be indemnified to the extent of the minimum amount of insurance coverage specified in § 28-1170(b)(2)(a). The omnibus clause in *Jenkins* is not germane to this case. If it were it would be a "short horse soon curried". Plaintiff adroitly argued the applicability of *Jenkins* to the facts in this case. *Jenkins* involved an *Owner's Policy*. The omnibus clause in *Jenkins* restricted the use of the vehicle if it was "operated by any member of the military or naval forces of the United States or any foreign country". *Jenkins* held that the "omnibus" in an *owner's policy* cannot be restricted and that a person who drives a car with the permission of its owner (express or implied) is an insured as a matter of law. *Jenkins* cannot be tortured to apply to a non-owner's type policy. The rationale in *Jenkins* is founded upon Public Policy. (380 P.2d 145, 146.)

> "The California Supreme Court, in Wildman v. Government Employees' Ins. Co., 48 Cal.2d 31, 39, 307 P.2d 359, 364, refused to allow an insurance company to set up a restrictive endorsement as a defense and applied an omnibus clause substantially similar to A.R.S. § 28-1170, subd. B(2), as follows:
>
> > 'It appears that section 415 must be made a part of every policy of insurance issued by an insurer since the public policy of this state is to make *owners of motor vehicles* financially responsible to those in-

jured by them in the operation of such vehicles.'" (Emphasis ours.)

Jacobs who may have given Trujeque permission to use the truck and who was the *owner* is clearly within the ambit of *Jenkins*. To extend *Jenkins* to cover C & P would be to judicially delete section 28-1172 and to judicially amend section 28-1170 B to include the term non-owner as well as owner.

CONCLUSIONS

1. The insurance contract issued to C & P is plain and unambiguous and therefore dictates coverage to the vehicle. The policy fully covered the vehicle when it was being used in the business of C & P. It is clearly established by the record that this vehicle was not being so used at the time of this accident.

2. The lease agreement; the conditional sales contract; the insurance policy; the statements of the parties; the plaintiff's original complaint; and the law, clearly establish that C & P did not own this vehicle at the time of the accident.

3. The Arizona Financial Responsibility Act applies only to an *Owner's Policy* and therefore is not applicable to this case.

Needless to say, when a timely appeal is taken from an appealable order granting summary judgment, the appellate court in reviewing must determine whether there is any genuine issue of material fact underlying the adjudication, and if not, whether the substantive law was correctly applied. *Koepke v. Fontecchio*, 177 F.2d 125 (C.A. 9th, 1949).

It is respectfully asserted that there is no genuine issue of material fact underlying the adjudication of this matter

and in that determination the District Court was correct. However, as has been set forth in the preceding argument the lower court erred in applying the substantive law to the undisputed facts.

In rectification thereof, it is asserted that this Court should reverse the District Court's order granting plaintiff's cross-motion for summary judgment. Further, since this reversal eliminates any basis for the denial of the defendant's motion for summary judgment, it is respectfully asserted that this Court should direct the granting of Travelers' motion for summary judgment. Authority for the above requested disposition is well established. *U. S. v. DeWitt*, 265 F.2d 393 (5 Cir., 1959) and *U. S. v. Toys of the World Club, Inc.*, 288 F.2d 89 (2d Cir., 1961).

Respectfully submitted,

KRAMER, ROCHE, BURCH & STREICH
By DANIEL CRACCHIOLO
567 First National Bank Bldg.
Phoenix, Arizona
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DANIEL CRACCHIOLO